

*Case Western Reserve Journal of Law, Technology & the Internet*  
Volume 1, Number 2 Spring 2010

# SOCIAL NETWORKING SITES: A REASONABLY CALCULATED METHOD TO EFFECT SERVICE OF PROCESS

*Melodie M. Dan*\*

## TABLE OF CONTENTS

I. INTRODUCTION.....	184
II. COMPLIANCE WITH DUE PROCESS UNDER MULLANE	
TRADITIONAL AND MODERN METHODS OF SERVICE.....	188
A. <i>Notifying a Defendant of a Lawsuit to Satisfy Due Process</i> .....	189
B. <i>The Mullane Standard</i> .....	189
C. <i>Post-Mullane Cases</i> .....	191
D. <i>Traditional Methods of Service</i> .....	192
1. Personal Service.....	193
2. Substitute Service to the Defendant's Agent or a Resident at the Defendant's Address.....	194
3. Service by Mail.....	194
4. Service by Posting.....	195
5. Service by Publication.....	195
E. <i>Evolution of Technology in the Service of Process World</i> .....	196
1. Telex.....	196
2. Facsimile Transmittal.....	197
3. Television Advertisement.....	197
4. Electronic Mail ("Email").....	198
F. <i>What is a Social Networking Site</i> .....	201
III. SERVICE OF PROCESS OVER SOCIAL NETWORKING SITES	
COMPLIES WITH THE MULLANE STANDARD AND MAY BE	
THE BEST ALTERNATIVE METHOD OF SERVICE IN SOME	

---

\* J.D., Thomas Jefferson School of Law (expected 2010); B.A., University of Southern California, 2001. The author thanks her legal writing, civil procedure, and directed study professor, Sandra Rierson. She also thanks her note editors, Mary Cheney and Elizabeth Stock. The author thanks Donald Dottler for giving her a great opportunity to learn about service of process from a real-life perspective, Derek Dailey, and her family for all their love and support. The author is grateful for everyone who encouraged her to submit this Note for publication and to JOLTI for fine tuning this Note.

CASES .....	204
A. <i>Substitute Service, Service by Mail and Posting</i> <i>Versus Service Over a Social Networking Site</i> .....	205
B. <i>Service by Publication Versus Service Over a Social</i> <i>Networking Site</i> .....	207
C. <i>Service Over E-Mail Versus Service Over a Social</i> <i>Networking Site</i> .....	209
IV. PROPOSED FACTORS A COURT SHOULD CONSIDER WHEN ALLOWING SERVICE OVER A SOCIAL NETWORKING SITE.....	212
V. CONCLUSION.....	218

## I. INTRODUCTION

The prevalence of social networking websites raises the question whether such sites should be available as another way to provide notice to a defendant or witness for the purposes of service of process.<sup>1</sup> Defendants and witnesses often attempt to avoid being personally served with a lawsuit or summons. It may be easier and cheaper for plaintiffs to serve them over a social networking site if all other traditional methods of service fail.

An early description of attempts to evade service of process is found in two 1930's articles from *The New Yorker*.<sup>2</sup> These articles tell the story of a process server named Harry Grossman, and illustrating how, at least since the 1930's, serving process on defendants personally can be a problem.<sup>3</sup> Grossman was a professional process server who did almost anything to effect service on a defendant.<sup>4</sup> Many of Grossman's subjects actively evaded service, often by ignoring him or hiding.<sup>5</sup> He would pose as an admiring fan or as a movie mogul to serve defendants. Grossman once managed to throw service papers from one building to another through an open window in order to serve a woman who refused to answer her door.<sup>6</sup>

Even in the twenty-first century, personal service upon a

---

<sup>1</sup> Memorandum from Amanda Lenhart, Senior Research Specialist & Mary Madden, Senior Research Specialist, Pew Internet & American Life Project (Jan. 7, 2007), at 1, [http://www.pewinternet.org/PPF/r/198/report\\_display.asp](http://www.pewinternet.org/PPF/r/198/report_display.asp); *MKM Capital Property, Ltd. v. Corbo*, No. SC 608 of 2008 (Aust. Cap. Terr. Supreme Court, Dec. 12, 2008) (order that default judgment can be served to a party by using Facebook).

<sup>2</sup> See St. Clair McKelway, *Profiles, Place and Leave With ~ I*, THE NEW YORKER, Aug. 24, 1935, at 23 [hereinafter McKelway, *Profiles I*]; see also St. Clair McKelway, *Profiles, Place and Leave With ~ II*, THE NEW YORKER, Aug. 31, 1935, at 21 [hereinafter McKelway, *Profiles II*].

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> McKelway, *Profiles I*, *supra* note 2, at 23-26.

defendant can be difficult. For example, in December 2008, after personal service upon defendants proved to be practically impossible, the Australian Capital Territory (“ACT”) Supreme Court<sup>7</sup> allowed the plaintiff, MKM Capital Property, Ltd., to serve a lien notice resulting from a default judgment against the defendants, Carmela Rita Corbo and Gordon Kingsley Maxwell Poyser, using Facebook.<sup>8</sup> Similarly, on February 5, 2009, a Canadian court in Alberta allowed a plaintiff to serve a defendant with a notice of a lawsuit by posting the notice onto “the Facebook profile of the defendant.”<sup>9</sup> Most recently, news reports and blogs<sup>10</sup> from May and October 2009 reported a United Kingdom High Court allowing plaintiff Donal Blaney to serve an order to an anonymous defendant over Twitter,<sup>11</sup> a real-time

---

<sup>7</sup> The ACT Supreme Court is the highest superior court level of the Australian Capital Territory. This Court has jurisdiction to determine original jurisdiction cases as well as appeals from the Magistrates Court and ACT Tribunals. See generally ACT Supreme Court Website, [http://www.courts.act.gov.au/supreme/content/about\\_us\\_history.asp?textonly=no](http://www.courts.act.gov.au/supreme/content/about_us_history.asp?textonly=no) (last visited Apr. 6, 2009) (providing a history of the Australian Supreme Court).

<sup>8</sup> Nick Abrahams, *Australian Court Serves Documents via Facebook*, THE SYDNEY MORNING HERALD (Australia), Dec. 12, 2008, available at <http://www.smh.com.au/articles/2008/12/12/1228585107578.html>.

<sup>9</sup> Shaunna Mireau, *Substitutional Service via Facebook in Alberta*, SLAW.CA (Canada), Sept. 24, 2009, available at <http://www.slaw.ca/2009/09/24/substitutional-service-via-facebook-in-alberta/>.

<sup>10</sup> Yang-Ming Tham, *Honest to Blog: Balancing the Interest of Public Figures and Anonymous Bloggers in Defamation Lawsuits*, 17 VILL. SPORTS & ENT. L.J. 229, 233 (2010) (defining a blog as a website “usually maintained by an individual with regular entities of commentary, description of events, or other material such as graphic or video”) (citation omitted).

<sup>11</sup> Chris Dale, *Service of UK Proceedings via Twitter*, THE E-DISCLOSURE INFORMATION PROJECT, Oct. 6, 2009, available at <http://chrisdale.wordpress.com/2009/10/06/service-of-uk-proceeding-via-twitter/>. See also *Twitter-court Order a Success, Claims Blogger*, OUT-LAW.COM (London), May 10, 2009, <http://www.out-law.com/page-10419>; *Court Order Served Over Twitter*, BBC NEWS (London), Oct. 1, 2009, available at <http://news.bbc.co.uk/2/hi/technology/8285954.stm>; Matthew Jones, *UK Court Orders Writ to be Served via Twitter*, REUTERS UK, Oct. 1, 2009, available at <http://uk.reuters.com/article/idUKTRES5904HC20091001?pageNumber=1&virtualBr andChannel=0>; Cliff Saran, *Blaney Blarney Wins Twitter Court Injunction*, COMPUTERWEEKLY.COM (Oct. 2, 2009, 12:19 PM), <http://www.computerweekly.com/Articles/2009/10/02/237953/blaney-blarney-wins-twitter-court-injunction.htm>; Jeremy Kirk, *UK High Court Serves Injunction Over Twitter*, PC WORLD (Oct. 2, 2009, 7:00 AM), available at [http://www.pcworld.com/article/173008/uk\\_high\\_court\\_serves\\_injunction\\_over\\_twitter.html](http://www.pcworld.com/article/173008/uk_high_court_serves_injunction_over_twitter.html); David Canton, *UK Court Orders Service via Twitter*, ELEGAL CANTON (Oct. 2, 2009, 6:47 AM), <http://canton.elegal.ca/2009/10/02/uk-court-orders-service-via-twitter/>; Jeremy Kirk, *Injunction Over Twitter Worked, Attorney Says*, IT WORLD (Oct. 6, 2009, 9:34 AM), <http://www.itworld.com/legal/80008/injunction-delivered-over-twitter-worked-attorney-says>; Judith Townend, *Editor's Blog: Donal Blaney Says Twitterer to Comply with Injunction*, JOURNALISM.CO.UK (Oct. 6, 2009), <http://blogs.journalism.co.uk/editors/2009/10/06/donal-blaney-says-twitterer-to-comply-with-injunction/>.

short messaging service.<sup>12</sup> Blaney, a right-wing political blogger, attempted to serve an anonymous defendant with an order to stop posting onto Twitter as Blarney.<sup>13</sup>

To date, no United States court or legislature has allowed any service of process over social networking sites. When a defendant is difficult to locate in person, by electronic mail, or through an agent, but can easily be found on a social networking site, United States courts should follow the lead of Australia, Canada, and the United Kingdom, and allow service of the defendant over such sites.

In the United States, personal service, along with service by mail and publication, is ineffective in certain situations. United States courts such as the Ninth Circuit Court of Appeals in *Rio Properties v. Rio International Interlink*, have accepted email as a proper method of service.<sup>14</sup> In *Rio*, the court reasoned service upon a defendant via email should be allowed because there was no other way for the plaintiff to contact the defendant, and because the defendant “had ‘embraced’ and ‘profited immensely’ from the modern business email model.”<sup>15</sup> American courts have usually allowed service by email in cases where the defendants are corporate entities.<sup>16</sup> Service of process using a social networking site may be a better alternative than a notice by email. When a plaintiff has exhausted methods of service as provided under the Federal Rules of Civil Procedure (“FRCP”) to locate and serve the defendant, such as personal service or substitute service to a defendant’s agent or to a resident at the defendant’s home,<sup>17</sup> the courts should permit the plaintiff, if possible, to serve the defendant over a social networking site.<sup>18</sup>

---

<sup>12</sup> “Twitter has grown into a real-time short messaging service that works over multiple networks and devices.” *About Twitter: About Us*, TWITTER.COM, <http://twitter.com/about#about> (last visited Nov. 19, 2009).

<sup>13</sup> See generally Canton, *supra* note 11.

<sup>14</sup> *Rio Props. Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1017-18 (9th Cir. 2002).

<sup>15</sup> Aaron R. Chacker, *E-effectuating Notice: Rio Properties v. Rio International Interlink*, 48 VILL. L. REV. 597, 618 (2003).

<sup>16</sup> See Maria N. Vernace, Comment, *E-Mailing Service of Process: It’s a Shoe In!*, 36 UWLA L. REV. 274, 285-300 (2005).

<sup>17</sup> FED. R. CIV. P. 4.

<sup>18</sup> As a civil litigation paralegal, the author had to resort to publication at least once for a defendant who was in her mid- to late-twenties, who did not own property and was not registered to vote. The author learned from a private investigator that this particular defendant had many problems that she was running from. Not one of the defendant’s many addresses were valid. The defendant was receiving mail at these addresses, but she moved often. After showing several attempts to serve her at many different addresses, the court allowed the plaintiff to serve the defendant by publication, which resulted in a default judgment. The defendant was easier to locate online through her own websites, which were devoted to her adult film career. The author’s employer thought about contacting the defendant at the movie studio or contacting the defendant’s manager or agent, but doing so would have resulted in tipping the defendant off to the lawsuit.

In the United States, the procedure for serving a defendant or a witness with a copy of the summons and complaint against him, gives that person notice of the action in compliance with the Due Process Clause of the Fourteenth Amendment.<sup>19</sup> Under *Mullane v. Cent. Hanover Bank & Trust Co.*, for a service of process to be constitutional, the method must be reasonably calculated to give a party notice of the action and an opportunity to respond.<sup>20</sup> Based on the *Mullane* standard, courts have allowed methods such as service by mail,<sup>21</sup> posting,<sup>22</sup> publication,<sup>23</sup> and even email.<sup>24</sup>

Part II of this Note will provide an overview of service methods used in the United States, past court decisions which defined traditional methods of service, and the expansion of existing rules in light of modern technological developments. It will then discuss past court decisions that explain why the courts hold these types of methods as acceptable forms of service, and it will do so in the context of the *Mullane* standard.

Part III of this Note will apply the reasoning of various court decisions, along with the *Mullane* standard, to service of process over social networking sites, and will urge courts to allow this method of service. This section will also discuss discovered and undiscovered problems with the allowed methods of service under the FRCP and under some state jurisdictions. Despite problems with traditionally acceptable methods of service, and more recently with email, courts have allowed all these methods under the *Mullane* standard.<sup>25</sup> Part III, therefore, will outline the differences between (1) service of process through substitute

---

<sup>19</sup> *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313-14 (1950).

<sup>20</sup> *Id.* at 314.

<sup>21</sup> See *Jones v. Flowers*, 547 U.S. 220, 225, 229, 234-35 (2006) (holding that prior to seizing a taxpayer's home, the government must take "reasonable additional steps" to give notice to a tax payer who fails to pay property taxes, such as resending a notice by regular mail so that a signature from the defendant was not required); *Tulsa Prof'l Collection Serv., Inc. v. Pope*, 485 U.S. 478, 490 (1988) (holding that if a creditor's identity is known or ascertainable, the executor of the estate should mail notice to the creditor or notify the creditor by means just as certain as mail to give actual notice); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798 (1983) (ruling that notice by publication should be supplemented with notice by mail, in a proceeding to sell a mortgagee's property for nonpayment of taxes); *Greene v. Lindsey*, 456 U.S. 444, 455-56 (1982) (ruling that, if a landlord gives a tenant notice of eviction by posting, the posting should be supplemented by mail); *Mullane*, 339 U.S. at 313-14 (finding that notice by publication should be supplemented with notice by mail); *Dobkin v. Chapman*, 21 N.Y.2d 490, 503-06 (1968) (allowing service by mail and publication in automobile accident case because attempting to effect actual notice in such case would be unfair to the plaintiffs).

<sup>22</sup> See *Greene*, 456 U.S. at 455-56.

<sup>23</sup> See *Mennonite Bd. of Missions*, 462 U.S. at 798.

<sup>24</sup> See *Rio Props. Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1017-18 (9th Cir. 2002).

<sup>25</sup> Chacker, *supra* note 15, at 618.

service, mail and posting versus service of process over social networking sites, (2) service by publication versus service over social networking sites, and (3) service by e-mail versus service over social networking sites.

Part IV proposes courts, as well as federal and state statutes, require certain factors to exist in order for a plaintiff to serve a defendant over a social networking site. The Australian ACT allowed the plaintiff to send a private message over Facebook to both defendants, informing them of the entry and the terms of the default judgment against them.<sup>26</sup> However, this was only after the plaintiff was able to show the defendant's Facebook page listed the defendant's correct date of birth and known acquaintances as Facebook friends.<sup>27</sup> In the United Kingdom Twitter case, Blaney was allowed to serve an anonymous defendant only after he was able to show the defendant was a regular Twitter user.<sup>28</sup> The Court may have also allowed Blaney to serve the defendant over Twitter because the defendant's existence was only known through his Twitter use and the harm to Blaney was done via Twitter.<sup>29</sup>

If courts in the United States allow service over social networking sites, a plaintiff should be similarly required to demonstrate a high likelihood of the defendant receiving notice of an action. A court could determine the probability of effective service over a social networking site based on factors such as how well the defendant's page identifies the defendant, and how often the defendant is active on the site.

In summary, this Note will discuss the issues arising from plaintiffs serving defendants via social networks. In doing so, it will demonstrate why courts must allow service over social networking sites, despite problems such service may raise.

## II. COMPLIANCE WITH DUE PROCESS UNDER MULLANE: TRADITIONAL AND MODERN METHODS OF SERVICE

United States courts require defendants to receive notice of legal actions against them.<sup>30</sup> Plaintiffs notify defendants of such actions by serving a copy of a summons issued by the court, and

---

<sup>26</sup> See *MKM Capital Property, Ltd. v. Corbo*, No. SC 608 of 2008 (Aust. Cap. Terr. Supreme Court, Dec. 12, 2008) (order that default judgment can be served to a party by using Facebook).

<sup>27</sup> Bonnie Malkin, *Australian Couple Served with Legal Documents via Facebook*, TELEGRAPH (London), Dec. 16, 2008, available at <http://www.telegraph.co.uk/news/newstoppers/howaboutthat/3793491/Australian-couple-served-with-legal-documents-via-Facebook.html>.

<sup>28</sup> Dale, *supra* note 11.

<sup>29</sup> *Id.*

<sup>30</sup> FED. R. CIV. P. 4(c).

a copy of their complaint to the defendant.<sup>31</sup> Over time, different methods of service have developed due to the advancement of technology. Based on the facts of each case before it, a court must use the *Mullane* standard to determine whether a method of service, new or old, widely accepted or not, violates a defendant's due process rights.<sup>32</sup>

#### A. Notifying a Defendant of a Lawsuit to Satisfy Due Process

After a plaintiff has filed a complaint/lawsuit, the defendant must receive notice of the action.<sup>33</sup> When a plaintiff files a complaint with the court, the court issues a summons directed to the defendant(s), notifying him "that failure to appear and defend [the lawsuit] will result in a default judgment against the defendant for the relief demanded in the complaint."<sup>34</sup> After a lawsuit is filed, if the plaintiff fails to notify the defendant of the lawsuit by serving the summons and complaint within a certain time, the court will dismiss the action.<sup>35</sup>

The Due Process Clause of the Fourteenth Amendment states that no "State [shall] deprive any person of life, liberty, or property, without due process of law."<sup>36</sup> In the context of a civil lawsuit, the Due Process Clause demands that a defendant must have the opportunity to respond and to present his side of the case to the court.<sup>37</sup> The leading case regarding the requirement of reasonable notice is *Mullane v. Central Hanover Bank & Trust Co.*<sup>38</sup>

#### B. The Mullane Standard

In *Mullane*, the trustee of a common trust fund failed to give beneficiaries sufficient notice of a judicial settlement of their accounts.<sup>39</sup> The only notice of the action given to the beneficiaries was a notice in a local newspaper, which ran for four consecutive weeks.<sup>40</sup> The Supreme Court ruled the trustee provided insufficient notice of the judicial settlement of the beneficiaries' accounts which deprived the beneficiaries of

---

<sup>31</sup> *Id.*

<sup>32</sup> *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 307-09 (1950).

<sup>33</sup> FED. R. CIV. P. 4(c).

<sup>34</sup> FED. R. CIV. P. 4(a)(1)(b).

<sup>35</sup> FED. R. CIV. P. 4(m).

<sup>36</sup> U.S. CONST. amend. XIV, § 1 (applying the Due Process Clause to the states).

<sup>37</sup> *Mullane*, U.S. at 307-09.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 307.

<sup>40</sup> *Id.* at 309-10.

property, and thus violated the Due Process Clause.<sup>41</sup>

Due to the risk of the beneficiaries losing their property, the Court employed a balancing test that weighed the beneficiaries' rights at stake with the trustee's burden of giving actual notice to the beneficiaries.<sup>42</sup> In *Mullane*, the trustee had the beneficiaries' addresses on hand, so he could have easily mailed the beneficiaries a notice of the lawsuit instead of publishing it.<sup>43</sup> The balancing test weighs the defendant's right at stake with the plaintiff's burden of giving actual notice to the defendant.<sup>44</sup> Generally, the greater the right at stake for the defendant, the more "perfect" the notice that courts require.<sup>45</sup> If a defendant risks losing his home or a great amount of money in a lawsuit, courts will require a method of service likely to give him actual notice. However, if a defendant's interest at stake is relatively minor and it would be very burdensome for the plaintiff to give actual notice to the defendant; courts may allow methods less likely to give actual notice.<sup>46</sup>

The Court in *Mullane* went on to state when a party is deprived of due process, notice of the lawsuit must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."<sup>47</sup> The Court further stated notice should reasonably convey information required by law and give interested parties reasonable time to appear before the court.<sup>48</sup> When a party's valuable property or interest is at stake, a "mere gesture" of notice is insufficient, because it does not actually inform absent and interested parties.<sup>49</sup> A method of service is reasonable, and therefore valid, if it is "reasonably certain to inform" the defendant of the lawsuit.<sup>50</sup> The courts should allow an alternative method of service if the plaintiff can show, based on particular facts of the case, that such a method is as likely to give the defendant notice as the conventionally allowed methods.<sup>51</sup> *Mullane* essentially states a method of

---

<sup>41</sup> *Id.* at 314.

<sup>42</sup> *Id.* at 312-14.

<sup>43</sup> *Mullane*, 339 U.S. at 319.

<sup>44</sup> *Id.* See also *Jones v. Flowers*, 547 U.S. 220, 225 (2006); *Tulsa Prof'l Collection Serv., Inc. v. Pope*, 485 U.S. 478, 490 (1988); *Greene v. Lindsey*, 456 U.S. 444, 455-56 (1982); *Dobkin v. Chapman*, 21 N.Y.2d 490, 503-06 (1968).

<sup>45</sup> See *Flowers*, 547 U.S. at 225; *Tulsa Prof'l Collection Serv., Inc.*, 485 U.S. at 490; *Greene*, 456 U.S. at 455-56; *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 312-14 (1950); *Dobkin*, 21 N.Y.2d at 503-06.

<sup>46</sup> See *Dobkin*, 21 N.Y.2d at 503-06.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 314-15.

<sup>49</sup> *Id.* at 315.

<sup>50</sup> *Mullane*, 339 U.S. at 312-14.

<sup>51</sup> *Id.* ("The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to



service is valid if it is reasonably calculated to give an interested party or a defendant notice of an action against him.<sup>52</sup>

### C. Post-Mullane Cases

Many cases following *Mullane* have ruled notice by publication, posting, or mail alone, without attempts of personal service on an interested party, is insufficient under the *Mullane* standard.<sup>53</sup> The basis of these holdings is such methods fail to give the parties adequate notice of an action.<sup>54</sup> In *Mennonite Board of Missions v. Adams*, the Court ruled personal service or service by mail was required to give notice to lien holder Mennonite Board of Missions (“MBM”), even though MBM may have been sophisticated enough to know of the action.<sup>55</sup> MBM acquired the mortgage to a piece of property from a debtor.<sup>56</sup> When the debtor failed to pay property taxes on the property, the county proceeded with a lien sale on the property.<sup>57</sup> The only notice the county gave to interested parties other than the debtor who failed to pay property taxes was by publication and posting.<sup>58</sup> The Court ruled publication and posting<sup>59</sup> were insufficient under the *Mullane* standard to give MBM adequate notice, due to MBM’s valuable interest in the property at issue in this case.<sup>60</sup>

In *Greene v. Lindsey*, the Court ruled posted notices alone were insufficient to effect service, because the tenants in the case failed to actually receive the posted notices of eviction actions against them.<sup>61</sup> The Court suggested a plaintiff must supplement a posted notice with an additional notice by mail in

---

inform those affected..., or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.”).

<sup>52</sup> *Id.* at 314-15.

<sup>53</sup> *See Tulsa Prof’l Collection Serv., Inc. v. Pope*, 485 U.S. 478, 491 (1988); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 799-800 (1983); *Covey v. Town of Somers*, 351 U.S. 141, 146 (1956); *Dobkin v. Chapman*, 21 N.Y.2d 490, 503-06 (1968). *Contra* *Greene v. Lindsey*, 456 U.S. 444, 455-56 (1982) (allowing service by post supplemented with postal mail, not requiring personal service).

<sup>54</sup> *See id.*

<sup>55</sup> *Mennonite Bd. of Missions*, 462 U.S. at 799.

<sup>56</sup> *Id.* at 792.

<sup>57</sup> *See id.* at 794.

<sup>58</sup> *Id.*

<sup>59</sup> Posting alone was insufficient notice in the case of eviction, because the notice could have easily been taken down. In cases with a high interest at stake, such as a person who may be losing their home, a more prudent methods of service, like mail, was required. *Greene v. Lindsey*, 456 U.S. 444, 446 n.1 (1982) (“‘Posting’ refers to the practice of placing the writ on the property by use of a thumbtack, adhesive tape, or other means.”).

<sup>60</sup> *See Mennonite Bd. of Missions*, 462 U.S. at 798.

<sup>61</sup> *See Greene*, 456 U.S. at 453-56.

order for service to be adequate.<sup>62</sup> The Court ruled after the plaintiff attempts to serve the defendant in person and then proceeds to serve the defendant by posting, the plaintiff must try yet another conventional method of service.<sup>63</sup> The Court suggested mail could be this final attempt at service because it is an “inexpensive and efficient mechanism” that is “available to enhance the reliability of an otherwise unreliable notice procedure.”<sup>64</sup> Based on consistent case law, courts seem to prefer personal service above all other forms of service, putting mail, posting and publication as “feasible and customary” alternatives.<sup>65</sup>

#### *D. Traditional Methods of Service*

Before a federal court can consider whether a particular method of service is constitutional and therefore a reasonable method under *Mullane*, the FRCP or applicable state statute must first allow the method.<sup>66</sup> In accordance with case law, the FRCP allows a party to serve notice of an action on a defendant within a judicial district of the United States by (1) personally delivering the summons and complaint on the defendant, (2) leaving a copy of notice with a person of “suitable age and discretion” who resides at defendant’s residence, (3) delivering a copy of the notice to an authorized agent appointed by the defendant or by law to receive such notice, or (4) any method allowed under state law in which the district court sits or in which service is effected, so long as the method does not violate a defendant’s due process rights.<sup>67</sup> Essentially, a federal court will only consider the constitutionality of methods authorized by FRCP Rule 4(e) and alternative methods allowed by applicable state law. Some state laws permit mail, posting, and publication as methods of service so long as process servers diligently attempt other methods,<sup>68</sup> even if those other methods ultimately

---

<sup>62</sup> *See id.*

<sup>63</sup> *See id.* at 455-56.

<sup>64</sup> *Id.* at 455.

<sup>65</sup> *See id.* at 454.

<sup>66</sup> FED. R. CIV. P. 4(e)(2) provides for service through (1) delivery to the individual personally, (2) leaving a copy at the individual’s dwelling with someone of suitable age, and (3) delivering a copy to an authorized agent. Rule 4(e)(1) provides for service through the methods prescribed by state law. FED. R. CIV. P. 4(e)(1)-(2).

<sup>67</sup> *See* FED. R. CIV. P. 4(e)(1)-(2); *Greene v. Lindsey*, 456 U.S. 444, 455-56 (1982) (holding that a Kentucky rule violated the Fourteenth Amendment Due Process Clause because it allowed service by posting in an eviction proceeding after only one attempt at personal service, without any method of reliable service to supplement the posting).

<sup>68</sup> *See, e.g.*, CAL. CIV. PROC. CODE §§ 415.10-.95 (West 2004); N.Y. C.P.L.R. 308(1)-(5) (McKinney 2001); 735 ILL. COMP. STAT. ANN. 5/2-203 (West 2010).

prove to be ineffective.<sup>69</sup>

When serving a defendant in a foreign country, the FRCP allows the plaintiff to serve the defendant (1) by any internationally agreed means of service reasonably calculated to give notice, (2) if there is no internationally agreed means of service, by a method reasonably calculated to give notice as prescribed by the foreign country's law for such service, as the foreign country directs in a letter in response to a letter of request, or, unless prohibited by the country's laws, personally delivering the summons and complaint on the defendant or by any form of mail requiring a signed receipt, or (3) by other means not prohibited by international agreement, as the court orders.<sup>70</sup> Federal rules for serving an individual in a foreign country appear to be broader than federal rules for serving an individual in a judicial district of the United States. Federal rules for serving an individual within the United States are confined to the traditional methods explicitly listed in FRCP 4(e)(1), methods allowed by state statute, and methods allowed by case law.<sup>71</sup> On the other hand, a plaintiff can provide sufficient notice to a defendant from another country as long as the means of service are "reasonably calculated to give notice" and "means not prohibited by international agreement."<sup>72</sup> Thus, as section II.E of this Note will demonstrate, when a United States court allows a party to serve notice upon another party through a more recently developed technology or method, a defendant in a foreign country is typically involved.<sup>73</sup>

## 1. Personal Service

One of the first traditional methods of serving process is personal service. A plaintiff successfully effects personal

---

<sup>69</sup> See discussion *infra* Part III.B. See also *Greene*, 456 U.S. at 453-56, 459-60; *Dobkin v. Chapman*, 21 N.Y.2d 490, 503-06 (N.Y. 1968).

<sup>70</sup> See FED. R. CIV. P. 4(f)(1)-(3).

<sup>71</sup> See FED. R. CIV. P. 4(e)(1)-(2).

<sup>72</sup> FED. R. CIV. P. 4(f)(1)-(3).

<sup>73</sup> See discussion *infra* Part II.E. See also *Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1016-19 (9th Cir. 2002) (allowing the plaintiff to serve the defendant, a foreign Internet business entity, via email); *In re Int'l Telemedia Assocs., Inc.*, 245 B.R. 713, 720 (Bankr. N.D. Ga. 2000) (allowing the plaintiff to serve the defendant, a foreign corporation, via email and facsimile transmittal when the defendant failed to give the plaintiff his permanent street address and the plaintiff made diligent attempts to serve defendant through traditional methods of service); *Smith v. Islamic Emirate of Afghanistan*, No. 01-Civ. 10132 (HB), 2001 U.S. Dist. LEXIS 21712, at \*1 (S.D.N.Y. Dec. 26, 2001) (allowing the plaintiffs to serve the defendants Osama bin Laden, al Qaeda, the Taliban and the Islamic Emirate of Afghanistan over television); *New England Merchs. Nat'l Bank v. Iran Power Generation and Trans. Co.*, 495 F. Supp. 73, 75-76 (S.D.N.Y. 1980) (allowing plaintiff to serve notice to an Iranian corporation via telex).

service upon a defendant when the plaintiff delivers a copy of a summons and complaint to the defendant in person. As mentioned earlier, plaintiffs and their process servers have often found it difficult to serve defendants personally.<sup>74</sup> In 1935, *The New Yorker* illustrated the difficulties of personal service with two articles about the adventures of process server Harry Grossman.<sup>75</sup> These pre-*Mullane* articles demonstrate the difficulties of personally serving individuals who can be located, but manage to avoid service. Even though many methods of effecting service exist today, personal service is still a preferred method, because it is a “classic form of notice always adequate in any type of proceeding.”<sup>76</sup>

## 2. Substitute Service to the Defendant’s Agent or a Resident at the Defendant’s Address

Typically, a process server can serve a defendant by leaving a copy of the summons and complaint with a person at least eighteen years old who is the defendant’s agent or a resident of the defendant’s home.<sup>77</sup> When this is done, the process server must explain to the person the contents of the summons and complaint and any other papers served.<sup>78</sup> This served person must also be competent enough to understand the contents of the notice papers.<sup>79</sup> When service is made upon a defendant’s agent, there is an expectation that the defendant actually appointed the agent for the specific purpose of receiving such notice and that the defendant intended for the agent to receive the notice.

## 3. Service by Mail

The FRCP does not explicitly allow service by mail, but as *Mullane*, *Mennonite* and *Greene* demonstrate, the Supreme Court prefers mail as an alternative or supplemental method of service to posting and publication.<sup>80</sup> In 1982, the Supreme Court proposed that Congress change the Rules to allow service by

---

<sup>74</sup> See *supra* notes 2-6.

<sup>75</sup> See McKelway, *Part I*, *supra* note 2, at 23; McKelway, *Part II*, *supra* note 2, at 21.

<sup>76</sup> *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

<sup>77</sup> See generally CAL. CIV. PROC. CODE § 415.20(a)-(b) (West 2004) (allowing service of process by leaving a copy of the summons and complaint with a member of the household, who is at least eighteen years old, and explaining to him or her the general contents of the documents).

<sup>78</sup> See *id.*

<sup>79</sup> See *id.*

<sup>80</sup> See *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983); *Greene v. Lindsey*, 456 U.S. 444, 453-56 (1982); *Mullane*, 339 U.S. at 319.

registered or certified mail, with a return receipt.<sup>81</sup> However, Congress rejected this proposal due to concerns about illegible or un-matching signatures on the return receipts, as well as instances where such mail is refused or unclaimed.<sup>82</sup>

#### 4. Service by Posting

Posting is “the practice of placing the writ on the property by use of a thumbtack, adhesive tape, or other means.”<sup>83</sup> Courts allow posting as a method of service when a state or federal statute explicitly allows it. However, the Supreme Court’s decisions in *Menonite* and *Greene* indicate that posting alone is less preferred to personal service and mail because, in cases where the defendant has a valuable interest at stake, posting fails to meet the minimum standards of due process, and often fails to provide actual notice.<sup>84</sup>

#### 5. Service by Publication

Courts allow publication as a method of service under certain rules created by case law. However, this is usually a last resort method because it is unlikely to give interested parties actual notice of an action.<sup>85</sup> Courts prefer publication as a supplemental method of service.<sup>86</sup>

In California, a plaintiff may serve a defendant by publication after showing the court he has already attempted to serve the defendant by other methods provided for by statute.<sup>87</sup> Once a court is satisfied with the plaintiff’s diligence in attempting to serve the defendant, the court will issue an order allowing the plaintiff to effect service by publication.<sup>88</sup> A plaintiff may then serve a defendant a summons and complaint by publishing copies of these documents, usually in the classifieds section of a local newspaper. There are limitations on where a plaintiff can publish such a notice and on how long the publication must run in the newspaper.<sup>89</sup>

Along with publication, mail and posting are also feasible

---

<sup>81</sup> See 128 CONG. REC. H 9848, H 9852 (Dec. 15, 1982), reprinted in 96 F.R.D. 116, 122-23.

<sup>82</sup> 128 CONG. REC. 9848, 9852 (1982).

<sup>83</sup> *Greene*, 456 U.S. at 4467.

<sup>84</sup> *Id.* at 453; *Menonite Bd. of Missions*, 462 U.S. at 799.

<sup>85</sup> See *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315-16 (1950); CAL. CIV. PROC. CODE § 415.50 (West 2009).

<sup>86</sup> See *Mullane*, 339 U.S. at 316.

<sup>87</sup> CAL. CIV. PROC. CODE § 415.50(a) (West 2009).

<sup>88</sup> CAL. CIV. PROC. CODE § 415.50(b) (West 2009).

<sup>89</sup> See CAL. CIV. PROC. CODE § 415.50 (West 2009).

and customary alternatives to personal service that were used prior to and at the time of the *Mullane* decision. Since *Mullane*, new technologies have expanded the field of process serving methods.

### *E. Evolution of Technology in the Service of Process World*

Since *Mullane*, communication technologies such as telex, facsimile and email have developed, opening the door to service of process through these methods.<sup>90</sup> As these technologies continue to become more prevalent in our society, courts have allowed these methods to effect service of process. Also, as stated earlier, due to the FRCP's broader rules for serving an individual in a foreign country, most cases allowing the use of a new technology as a method of service involve defendants located in foreign countries.<sup>91</sup>

#### 1. Telex

Telex is an outdated communications system consisting of teletypewriters connected to a telephonic network to send and receive textual communications and data.<sup>92</sup> In *New England Merchants National Bank v. Iran Power Generation and Transmission*, a New York district court first allowed telex as an alternative method of service.<sup>93</sup> There, multiple plaintiffs brought lawsuits against Iran's government and private Iranian corporations for various civil wrongs, including the nationalization of private property.<sup>94</sup> In this case, the plaintiffs attempted to serve the defendants by all alternative methods statutorily provided to them. However, strained relations between the United States and Iran prevented the plaintiffs from attempting to serve the defendants in alternative ways both stated and not explicitly stated in applicable statutes.<sup>95</sup> Also, the defendants purposefully avoided all service attempts.<sup>96</sup> The court found that the defendants had actual notice of the lawsuits due to their intentional avoidance of service.<sup>97</sup> It also found that no statute precluded plaintiffs from serving by telex. The court

---

<sup>90</sup> John M. Murphy III, *From Snail Mail to E-Mail: The Steady Evolution of Service of Process*, 19 ST. JOHN'S J. LEGAL COMMENT. 81-99 (2004).

<sup>91</sup> See discussion *supra* Part II.D.

<sup>92</sup> Telex, BRITANNICA.COM,

<http://www.britannica.com/EBchecked/topic/586267/telex> (last visited Apr. 6, 2009).

<sup>93</sup> *New England Merchs. Nat'l Bank v. Iran Power Generation and Trans. Co.*, 495 F. Supp. 73, 75-76 (S.D.N.Y. 1980).

<sup>94</sup> *Id.* at 75.

<sup>95</sup> *Id.* at 80-81.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

concluded, therefore, that telex was a reasonable method of service.<sup>98</sup>

## 2. Facsimile Transmittal

Facsimile transmittal is a process whereby a document is scanned and converted into electrical signals, which are then transmitted over a communications channel such as a phone line and recorded on a printed page or displayed on a computer screen.<sup>99</sup> New York was one of the first jurisdictions to allow service of process by facsimile.<sup>100</sup> In *In Re International Telemedia Associates, Inc.*, the court allowed plaintiffs to serve a foreign defendant via mail, email, and facsimile<sup>101</sup> when the defendant refused to give the plaintiffs a permanent street address and the plaintiffs had made diligent efforts to serve the defendant.<sup>102</sup> The court found service by facsimile, supplemented with mail and email, to be a reasonable method of service, because the only means of communication between the parties was by email and because the defendant was known to travel frequently and unexpectedly.<sup>103</sup> Also, the statute governing alternative methods of service did not preclude the plaintiff from serving the defendant by facsimile, mail, and email.<sup>104</sup>

## 3. Television Advertisement

In at least one instance, a court allowed a plaintiff to serve defendants over television.<sup>105</sup> In *Smith v. Islamic Emirate of Afghanistan*, a district court in New York allowed a plaintiff to serve named defendants Osama bin Laden, al Qaeda, the Taliban and the Islamic Emirate of Afghanistan over television.<sup>106</sup> It allowed the plaintiffs to serve bin Laden and al Qaeda by newspaper publication and television broadcast,

---

<sup>98</sup> *New England Merchs. Nat'l Bank*, 495 F. Supp. at 79-80.

<sup>99</sup> *Facsimile*, BRITANNICA.COM, <http://www.britannica.com/EBchecked/topic/199972/fax> (last visited Apr. 6, 2009).

<sup>100</sup> *In re Int'l Telemedia Assocs., Inc.*, 245 B.R. 713, 720 (Bankr. N.D. Ga. 2000); Murphy, *supra* note 90, at 73, 85.

<sup>101</sup> *Int'l Telemedia Assocs., Inc.*, 245 B.R. at 719 (holding that plaintiffs could serve foreign defendants by alternative methods of service under FED. R. CIV. PROC. 4(f)(3), which was "adopted in order to provide flexibility and discretion to the federal courts in dealing with questions of alternative methods for service of process in foreign countries").

<sup>102</sup> *Id.* at 720.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Murphy, *supra* note 90, at 90.

<sup>106</sup> *Smith v. Islamic Emirate of Afghanistan*, No. 01-Civ. 10132 (HB), 2001 U.S. Dist. LEXIS 21712, at \*1 (S.D.N.Y. Dec. 26, 2001).

because the whereabouts of both defendants were unknown, making service by “traditional means . . . futile.”<sup>107</sup>

#### 4. Email

Several courts have allowed plaintiffs to effect service upon a defendant by email. Before it was allowed as a method of service in the United States, email was first allowed as a method of service in England, which has similar rules of civil procedure regarding service to the United States.<sup>108</sup> In 1996, the Queen’s Bench allowed service of an injunction via email.<sup>109</sup> The solicitors used an internet provider that allowed them to be notified when the defendant’s service provider received the sender’s email, but not when the email was read by the recipient. The defendant himself would then prove he received the email by responding to it.<sup>110</sup>

In 1999, *Columbia Insurance Co. v. Seescandy.com*<sup>111</sup> and *WAWA, Inc. v. Christensen*<sup>112</sup> became the first United States cases to consider email as a method of serving process. However, neither case held email to be a valid method of service under Rule 4 of the FRCP. In *Columbia Insurance*, the plaintiff brought suit against owners of internet domain names “seescandy.com” and “seescandys.com” for trademark infringement and dilution.<sup>113</sup> The court considered granting the plaintiffs a temporary restraining order after plaintiffs were unable to locate the defendants for the purpose of serving it with the summons and complaint.<sup>114</sup> The plaintiffs tried to serve the defendants at each of the addresses they found belonging to the owners of the domain names. Unfortunately, the court opinion fails to state whether the plaintiffs’ efforts to serve the defendants were conducted in person or by mail.<sup>115</sup> The plaintiffs attempted to serve defendants by emailing them at all known email addresses associated with the domains registered

<sup>107</sup> *Id.* at \*2-\*3, \*9-\*11.

<sup>108</sup> See Andriana L. Schultz, Comment, *Superpoked and Served: Service of Process Via Social Networking Sites*, 43 U. RICH. L. REV. 1497, 1508 (2009); Frank Conley, *Service with a Smile: The Effect of E-Mail and Other Electronic Communications on Service of Process*, 11 TEMP. INT’L & COMP. L.J. 407, 408, 410 (1997).

<sup>109</sup> Schultz, *supra* note 108, at 1508; Conley, *supra* note 108, at 407, 408, 410.

<sup>110</sup> Schultz, *supra* note 108, at 1508; Conley, *supra* note 108, at 408-10.

<sup>111</sup> *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999).

<sup>112</sup> *WAWA, Inc. v. Christensen*, No. Civ. A. 99-1454, 1999 WL 557936 (E.D. Pa. July 27, 1999).

<sup>113</sup> *Columbia*, 185 F.R.D. at 575.

<sup>114</sup> *Id.* at 577.

<sup>115</sup> *Id.* at 579.



to the defendants.<sup>116</sup> A California federal court stated that the plaintiffs' attempts to serve the defendant were insufficient for compliance with Rule 4 of the FRCP, but the plaintiffs showed a good faith attempt to identify and serve the defendants.<sup>117</sup> Ultimately, the court allowed the plaintiffs to submit a brief requesting a specific form of discovery, which would "lead to identifying information about [the] defendant that would make service of process possible."<sup>118</sup>

In *WAWA, Inc.*, the plaintiff filed a claim of trademark dilution against a Danish citizen who owned the domain name "wawawa.com."<sup>119</sup> The plaintiff served the defendant with the summons and complaint via postage mail, for which he received a signed return receipt. He also served the defendant by email.<sup>120</sup> There, the court held that email was not an allowed method of service under Rule 4 of the FRCP because the rule did not explicitly allow it. Yet, the court did acknowledge the fact that the Judicial Conference Rules Committee had "discussed and recommended" a change to Rule 4 that allows "service by electronic transmission."<sup>121</sup> Nevertheless, the court held the plaintiff's service of process was valid because he served the defendant by mail and had received a signed return receipt, which was explicitly allowed by Rule 4 of the FRCP and the Hague Convention.<sup>122</sup>

*Rio Properties, Inc. v. Rio International Interlink* was the first federal appellate case to address email as a method of service, and also the first to acknowledge it as a valid serving process.<sup>123</sup> In *Rio Properties*, the plaintiff, a hotel and casino operator, brought a trademark infringement suit against Rio International Interlink, an Internet sports gambling enterprise based in Costa Rica.<sup>124</sup> The Ninth Circuit Court of Appeals allowed the plaintiff to email the summons and complaint to the defendant, citing the *Mullane* standard that service via email was reasonably calculated to give the defendant notice of the

---

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 579.

<sup>118</sup> *Columbia Ins. Co.*, 185 F.R.D. at at 580.

<sup>119</sup> *WAWA, Inc. v. Christensen*, No. Civ. A. 99-1454, 1999 WL 557936, at \*1 (E.D. Pa. July 27, 1999).

<sup>120</sup> *Id.* at \*1.\*2.

<sup>121</sup> *Id.* at \*1.

<sup>122</sup> *Id.* at \*2.

<sup>123</sup> *Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1016-19 (9th Cir. 2002); see also *Murphy*, *supra* note 90, at 99-100 (stating that after the federal case *In re Telemedia Associates, Inc.*, 245 B.R. 713, 720 (Bankr. N.D. Ga. 2000) which allowed service by email coupled with service by facsimile, the first federal appellate case to address email as a method of service was *Rio Properties, Inc.*).

<sup>124</sup> *Rio Props.*, 284 F.3d at 1012-14.

lawsuit.<sup>125</sup> The court reasoned service by email was reasonable because the defendants were elusive, the plaintiffs had diligently attempted to serve the defendants by other methods, at least one of the defendants used email as a primary form of communication, and the defendants appeared to already have actual notice of the lawsuit.<sup>126</sup> The court disagreed with the defendant's claim that "email is never an approved method of service under Rule 4" as found in *WAWA, Inc.*<sup>127</sup> Furthermore, it concluded that, while the defendant "is correct that a plaintiff may not generally resort to email service on his initiative, in this case . . . email service was properly ordered by the district court using its discretion under Rule 4(f)(3)."<sup>128</sup>

Some courts have followed *Rio Properties's* example, allowing plaintiffs to serve process on defendants by email.<sup>129</sup> In *Ryan v. Brunswick Corp.*, a New York federal court denied a request for an order declaring the plaintiff's inability to obtain jurisdiction over the defendant, a Taiwanese corporation.<sup>130</sup> The court determined the plaintiff was able to validly serve the defendant via email.<sup>131</sup> Citing *Rio Properties*, the court stated it could "authorize other means of service as long as such means are not prohibited by international agreement and are directed by the court."<sup>132</sup> The court held Rule 4(f)(3) of the FRCP constitutionally allows it to authorize a plaintiff to serve a defendant via mail, fax or e-mail.<sup>133</sup>

In *Hollow v. Hollow*, a New York state court allowed a plaintiff to serve her husband, a citizen of Saudi Arabia, divorce papers via email.<sup>134</sup> Her husband moved to Saudi Arabia in 1999, and she attempted to serve him with divorce papers in 2001.<sup>135</sup> After his relocation, the only contact the plaintiff had with her husband was through his Yahoo email account.<sup>136</sup> The plaintiff attempted to serve her husband through an international

---

<sup>125</sup> *Id.* at 1016-19, 1023.

<sup>126</sup> *Id.* at 1016-19.

<sup>127</sup> *Id.* at 1018.

<sup>128</sup> *Id.*

<sup>129</sup> See *Ryan v. Brunswick Corp.*, No. 02-CV-0133E(F), 2002 WL 1628933 (W.D. N.Y. May 31, 2002) (holding that serving a Taiwanese corporation via mail, fax, or email is permitted under FRCP Rule 4(f)(3) and was not prohibited by Taiwanese law); *Hollow v. Hollow*, 193 Misc.2d 691 (N.Y. Sup. Ct. 2002) (allowing the plaintiff to serve her husband, a citizen of Saudi Arabia, divorce papers via email, international registered air mail and international registered standard mail after she proved her other attempts to serve her husband were futile); Murphy, *supra* note 90, at 103.

<sup>130</sup> *Ryan*, 2002 WL 1628933, at \*2-\*3.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at \*2 (internal quotations omitted).

<sup>133</sup> *Id.* at \*2-\*3.

<sup>134</sup> *Hollow*, 193 Misc.2d at 696.

<sup>135</sup> *Id.* at 692.

<sup>136</sup> *Id.*

process server,<sup>137</sup> but the process server could not easily serve the husband, as it took twelve to eighteen months to serve Letters of Rogatory, the only legal and acceptable method of service allowed in Saudi Arabia. Furthermore, a process server's attempt to serve the husband personally, at his place of employment, could have resulted in criminal charges against the server.<sup>138</sup> The plaintiff then requested the assistance of her husband's employer, which was refused.<sup>139</sup> New York state law allows service upon a defendant by personal service, by serving a person at the defendant's place of business or residence, by serving the defendant's agent for service, or by posting of notice or mail.<sup>140</sup> New York state law also allows the court to authorize alternative methods of service if the listed methods prove "impracticable."<sup>141</sup> The court held the plaintiff's attempts to serve her husband with divorce papers were impracticable under New York law.<sup>142</sup> Therefore, citing *Rio Properties*, the court allowed plaintiff to serve her husband via email at his last known email address, as well as by international registered air mail and international standard mail.<sup>143</sup>

Service by email is common in cases involving evasive international defendants. In such cases, the plaintiffs have made diligent efforts to serve the defendants. Further efforts to serve such hard-to-reach defendants may be too expensive, giving good reason for courts to allow service by email. Legal scholars have argued email service should not only be allowed more often in cases involving domestic defendants, but should also be incorporated into the Federal Rules of Civil Procedure as a statutorily allowed method of service.<sup>144</sup>

Telex, facsimile, television and email have been used as modes of effecting service on a defendant. Beyond these modes is the realm of social networking websites, which are currently taking over the communications stage. This Note explores whether they will usher in a further expansion of electronic service of process.

#### *F. What is a Social Networking Site?*

The existence of social networking sites goes back as far as

---

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Hollow v. Hollow*, 193 Misc.2d 691, 692 (N.Y. Sup. Ct. 2002).

<sup>140</sup> N.Y. C.P.L.R. 308(1)-(4) (McKinney 2009).

<sup>141</sup> N.Y. C.P.L.R. 308(5) (McKinney 2009).

<sup>142</sup> *Hollow*, 193 Misc.2d at 694.

<sup>143</sup> *Id.* at 694-96.

<sup>144</sup> Jeremy A. Colby, *You've Got Mail: The Modern Trend Toward Universal Electronic Service of Process*, 51 BUFF. L. REV. 337, 372-82 (2003).

the mid 1990's. Some early examples include Classmates.com and SixDegrees.com.<sup>145</sup> The currently popular social networking sites such as MySpace, Facebook and LinkedIn became part of the Internet forum in 2003 and 2004.<sup>146</sup> As of 2008, Facebook had more than sixty million active users worldwide, and MySpace had more than one hundred ten million active monthly users worldwide.<sup>147</sup> LinkedIn has over thirty-six million active users in more than two hundred countries and territories.<sup>148</sup> Twitter, a hybrid of social-networking and micro-blogging,<sup>149</sup> came into existence in March 2006<sup>150</sup> and was expected to grow to 12.1 million users by the end of 2009.<sup>151</sup>

Social networking sites allow individuals to stay in touch, get back in touch with friends and acquaintances, and network with others. Having an account with a social networking site is much like having an email account, except there is a public profile of the account holder resembling a small, personal website. Other account holders and sometimes even the Internet public at large can view this profile. Most social networking sites allow users<sup>152</sup> to search a catalogue of site members and

---

<sup>145</sup> Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 JOURNAL OF COMPUTER-MEDIATED COMMUNICATION 1 (2007), <http://jcmc.indiana.edu/vol13/issue1/boyd.ellison.html>.

<sup>146</sup> *Id.*

<sup>147</sup> Jeremiah Owyang, *Social Network Stats: Facebook, Myspace, Reunion*, WEB STRATEGY (Jan. 9, 2008), <http://www.web-strategist.com/blog/2008/01/09/social-network-stats-Facebook-myspace-reunion-jan-2008/>.

<sup>148</sup> *About Us*, LINKEDIN.COM, <http://press.linkedin.com/about> (last visited Apr. 6, 2009).

<sup>149</sup> *See generally Microblogging Definition*, TECHTARGET.COM, <http://searchmobilecomputing.techtarget.com/definition/microblogging> (last visited Nov. 19, 2009) ("Microblogging is a web service that allows the subscriber to broadcast short messages to other subscribers of the service."); R. Kayne, *What is Microblogging?*, WISEGEEK.COMK (Nov. 19, 2009), <http://www.wisegeek.com/what-is-microblogging.htm> (describing the purpose of microblogging and who microblogs); Scott Nesbitt, *Tech Tip-215: What is Microblogging?*, GEEKS.COM (Apr. 26, 2009), <http://www.geeks.com/techtips/2009/what-is-microblogging.htm> (examining the pros and cons of the world of microblogging).

<sup>150</sup> *About Us*, TWITTER.COM, <http://twitter.com/about#about> (last visited Nov. 19, 2009).

<sup>151</sup> Adam Ostrow, *How Many People Actually Use Twitter?*, MASHABLE (Apr. 28, 2009), <http://mashable.com/2009/04/28/twitter-active-users>. *See also* Lahle Wolfe, *Twitter Statistics How Many People Use Twitter?*, ABOUT.COM: LAHLE'S WOMEN IN BUSINESS BLOG (Oct. 19, 2009), <http://womeninbusiness.about.com/b/2009/10/19/twitter-statistics-how-many-people-use-twitter.htm>; Dayn W., *How Many People Use Twitter?*, DAYN W CREATIVE (Sept. 30, 2008), <http://www.daynw.com/how-many-people-use-twitter/>.

<sup>152</sup> Throughout the rest of this Note, the account holder of a social networking site profile will be referred to as a user. The term "user" will also generally refer to other persons who use social networking sites.

request to be added to their profiles as a friend or connection.<sup>153</sup> Social networking sites also allow members to send each other private messages through a message system linked to their profiles.<sup>154</sup> This system is just like email because users have a separate inbox for their messages, and no one but the account holders themselves can see them.<sup>155</sup> Sites such as MySpace and Facebook also provide their users with a more public method of sending messages. Both sites have a public board on the users' profile where other users can make comments to the profile owner.<sup>156</sup> The sites also have a system for users to publicly post bulletins to all of their friends.<sup>157</sup> MySpace and Facebook allow other users to see the time and date of a user's access and other activity on the site.<sup>158</sup> Facebook, for instance, has a "newsfeed" feature, which will list the time or date when other users have posted a new photo to their profile, or even when they have posted a comment to another user's profile.<sup>159</sup> However, profile owners can hide settings from other users.<sup>160</sup> Twitter allows users to post comments regarding other users' statuses or micro-

---

<sup>153</sup> See *Help Center: How do I control who can find me in searches and what they can see and do?*, FACEBOOK.COM, <http://www.facebook.com/help/?page=923#!/help/?faq=12035> (last visited Jun. 29, 2009).

<sup>154</sup> See *Help Center: How do I send a message?*, FACEBOOK.COM, <http://www.facebook.com/help/?page=938#!/help/?faq=12201> (last visited Jun. 29, 2009).

<sup>155</sup> See *Help Center: What happens when I message someone?*, FACEBOOK.COM, <http://www.facebook.com/help/?page=938#!/help/?faq=12207> (last visited Jun. 29, 2009).

<sup>156</sup> See *Help Center: What can I do on the Wall?*, FACEBOOK.COM, <http://www.facebook.com/help/?page=820#!/help/?faq=13153> (last visited Jun. 29, 2009); *Help Center: Who can see my wall?*, FACEBOOK.COM, <http://www.facebook.com/help/?page=820#!/help/?faq=12016> (last visited Jun. 29, 2009).

<sup>157</sup> See *Bulletin: How Can You Send Private Bulletins to Your Friends?*, MYSPACE.COM, [http://faq.myspace.com/app/answers/detail/a\\_id/310/kw/bulletin/r\\_id/100061](http://faq.myspace.com/app/answers/detail/a_id/310/kw/bulletin/r_id/100061) (last visited Jun. 29, 2009).

<sup>158</sup> See Ruchi Sanghvi, *Facebook Gets a Facelift*, FACEBOOK BLOG (Sept. 5, 2006, 1:03 PM), <http://blog.Facebook.com/blog.php?post=2207967130> (explaining the newsfeed feature, which documents friends' recent activity on Facebook). See generally *Help Center: New Feed and Stream*, FACEBOOK.COM, <http://www.facebook.com/help.php?page=408> (last visited Jun. 29, 2009) (providing answers to frequently asked questions about Facebook's news feed and stream features).

<sup>159</sup> See Sanghvi, *supra* note 58.

<sup>160</sup> See generally *Help Center: Privacy*, FACEBOOK.COM, <http://www.Facebook.com/help.php?page=419> (last visited Apr. 6, 2009) (explaining the privacy options a user may apply to his or her profile, thereby limiting what others, either inside or outside of the user's network, can and cannot see).

blogs as replies.<sup>161</sup>

Like email, social networking sites have become part of many individuals' daily routines. Even law students and graduate students use social networking sites daily.<sup>162</sup> Aside from email, the primary purpose for which many young adults use the Internet is to visit social networking sites.<sup>163</sup> Given there are at least one hundred ten million users of social networking sites, it may be easier to locate an individual over the Internet than in person.<sup>164</sup> Therefore, United States courts must consider allowing service of process over social networking sites.

### III. SERVICE OF PROCESS OVER SOCIAL NETWORKING SITES COMPLIES WITH THE MULLANE STANDARD AND MAY BE THE BEST ALTERNATIVE METHOD OF SERVICE IN SOME CASES

Despite numerous methods available to serve a defendant,<sup>165</sup> situations still arise when a plaintiff simply cannot locate a defendant.<sup>166</sup> Furthermore, even the most common alternative methods of service currently available do not guarantee effective service or provide actual notice.<sup>167</sup>

A common issue with currently allowed methods of service is acquiring confirmation that a defendant received actual or

---

<sup>161</sup> See *Help Resources: What are @replies and mentions?*, TWITTER.COM, <http://help.twitter.com/entries/14023-what-are-replies-and-mentions> (last visited Nov. 19, 2009) (explains the purpose of relevant twitter commands).

<sup>162</sup> See Josh Camson, *New Social Networking Sites for Law Students: Good Ideas, Needs Participants*, SOCIAL MEDIA LAW STUDENT BLOG (Mar. 25, 2009), <http://socialmedialawstudent.com/featured/new-social-networking-site-for-law-students-good-idea-needs-participants/>.

<sup>163</sup> Lenhart & Madden, *supra* note 1, at 1.

<sup>164</sup> See *MKM Capital Property, Ltd. v. Corbo*, No. SC 608 of 2008, at 1-2 (Aust. Cap. Terr. Supreme Court, Dec. 12, 2008) (ordering that plaintiff affect service of the default judgment by sending a private message to defendants online to the Facebook pages). See also Author's comment about the difficulty of locating a defendant, *supra* note 18.

<sup>165</sup> See FED. R. CIV. P. 4(c); *New England Merchs. Nat'l Bank v. Iran Power Generation & Transmission Co.*, 495 F. Supp. 73, 75-76 (S.D.N.Y. 1980); *Int'l Telemedia Assocs. v. Diaz*, 245 B.R. 713, 720 (Bankr. N.D. Ga. 2000); *Smith v. Islamic Emirate of Afghanistan*, No. 01 Civ. 10132 (HB), 2001 U.S. Dist. LEXIS 21712, at 1 (S.D.N.Y. Dec. 26, 2001); *Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1012 (9th Cir. 2002); *Murphy*, *supra* note 90, at 100.

<sup>166</sup> See *MKM Capital Property, Ltd. v. Corbo*, No. SC 608 of 2008, at 1-2 (Aust. Cap. Terr. Supreme Court, Dec. 12, 2008); *McKelway, Part I*, *supra* note 2, at 23.

<sup>167</sup> See *Greene v. Lindsey*, 456 U.S. 444, 459-60 (1982) (O'Connor, J., dissenting) (refuting majority's proposition that service by mail is more reliable than posting as a method of serving eviction notices, as the Court has no way of knowing how a defendant is more likely to receive actual notice).

constructive<sup>168</sup> notice of a lawsuit against him.<sup>169</sup> Under the *Mullane* standard, a valid method of service is one reasonably calculated to give the defendant notice of an action against him.<sup>170</sup> This standard is applied to the facts of each individual case.<sup>171</sup> This standard is not a bright line rule, and does not require a defendant to receive actual notice of an action against him. However, courts do consider whether a method of service will actually give notice of an action to a defendant when the defendant has a valuable interest at stake in the lawsuit.

*A. Substitute Service, Service by Mail and Posting versus  
Service over a Social Networking Site*

Serving a summons and complaint to a defendant's agent or member of his household, service by mail, and posting are all commonly accepted alternative methods of service. Often, these methods will not be sufficient service alone and must be supplemented by one another. However, even then, there is still a chance a defendant will not be notified of a lawsuit. If personal service, mail, or posting is supplemented with service over a social networking site, there is a greater likelihood the plaintiff will be able to give actual notice to a defendant.

When a plaintiff serves the summons and complaint to the defendant's agent or household member instead of the defendant, there is a risk the agent or household member will fail to notify the defendant of the lawsuit. Therefore, state substitute service rules may require a plaintiff supplement substitute service upon a defendant by mailing a copy of the summons and complaint to the address where the plaintiff served the defendant's agent or household member.<sup>172</sup> With registered mail, a plaintiff can obtain confirmation showing a defendant has received a summons and complaint with a return receipt. However, a defendant can avoid accepting service of the letter by simply refusing to sign the return receipt.<sup>173</sup> Courts have also allowed plaintiffs to serve defendants by simply mailing the summons and complaint to the defendants without a

---

<sup>168</sup> "Constructive service" is defined as "service accomplished by a method or circumstance that does not give actual notice." BLACK'S LAW DICTIONARY 1372 (7th ed. 1999).

<sup>169</sup> *See Rio Props.*, 284 F.3d at 1018 (noting concern with regard to confirmation of receipt of the notice sent to defendant via email).

<sup>170</sup> *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313-14 (1950).

<sup>171</sup> *Id.*

<sup>172</sup> *See generally* CAL. CIV. PROC. CODE § 415.10 (West 2004).

<sup>173</sup> *Jones v. Flowers*, 547 U.S. 220, 225, 229, 234-35 (2006) (allowing plaintiff to send notice via postal mail, as return of an "unclaimed" certified letter may mean that the defendant was not home to sign for the letter, or that he had moved).

request for a return receipt.<sup>174</sup> This could be done in hopes that the defendants simply open the envelope, not realizing it is a summons and complaint until they view the letter.<sup>175</sup>

Confirmation showing a defendant received actual notice is also an issue for posting, which in *Greene*, was not allowed in eviction cases.<sup>176</sup> The Court ruled posting alone is an unreliable way to provide notice to tenants in an action as fast moving as an eviction case.<sup>177</sup> Further, the Court held posting without a supplemental method of service is insufficient in a case where tenants may be liable for monetary damages in the form of past due rent.<sup>178</sup> The Court also noted the potential problems of a third party taking down the posting or the posting falling off and getting lost.<sup>179</sup>

If courts allow a plaintiff to serve a defendant over a social networking site, the plaintiff can more easily gain confirmation that the defendant received notice of the plaintiff's lawsuit. On a social networking site, a plaintiff may be able to determine when a defendant last visited his account, which would show the defendant may have received the notice.<sup>180</sup> MySpace makes it easy to see when a person last visited his online account, although the account owner can hide this information.<sup>181</sup> A process server could even post exhibits, such as a copy of the summons and complaint, for the defendant's viewing because sites such as Facebook and MySpace allow users to post images or scanned PDF<sup>182</sup> documents via an HTML<sup>183</sup> link.<sup>184</sup> Serving

---

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Greene v. Lindsey*, 456 U.S. 444, 452-54 (1982).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 450.

<sup>179</sup> *Id.*

<sup>180</sup> Sanghvi, *supra* note 158.

<sup>181</sup> When the author searches her own name, "Melodie Dan," under Myspace.com's "People" search feature there is one result, showing the author's MySpace profile. If the user chooses this result, the new page shows the author's age, current city location and last login date. *See People Search*, MYSPACE.COM, <http://searchservice.myspace.com/index.cfm?fuseaction=sitesearch.results&qry=miss%20melodie%20hizouse&type=People> (last visited Apr. 6, 2009); *see also People Search*, MYSPACE.COM, <http://searchservice.myspace.com/index.cfm?fuseaction=sitesearch.results&qry=melodie%20dan&type=People> (last visited Mar. 28, 2010).

<sup>182</sup> A PDF is a Portable Document Format developed by Adobe Systems. A PDF file captures the original layout of the document when it is converted to a PDF file. *See generally What Are PDF Files?*, PDF.COM, <http://www.pdf-file.com/define-pdf-files-glossary.asp> (last visited Mar. 28, 2010); *see also Adobe and PDF*, ADOBE.COM, <http://www.adobe.com/products/acrobat/adobe.pdf.html> (last visited Mar. 28, 2010).

<sup>183</sup> *See* Daniel Young, *What is HTML and What Does HTML Stand for?*, EZINE ARTICLES, Oct. 29, 2008, <http://ezinearticles.com/?What-is-HTML-and-What-Does-HTML-Stand-For?&id=1629063> (stating that HTML stands for Hyper Text Markup Language); *see also Beginner's Guide to HTML or, How to Make Your First*



defendants in this fashion may overcome the confirmation of notice problem courts have had with substitute service, mail and posting.

*B. Service by Publication versus Service over a Social Networking Site*

Publication is often a last resort method courts allow.<sup>185</sup> Although the defendant likely will not get notice of the action against him through service by publication, it is an allowed method of service to give the defendant constructive notice of an action. This last resort method often enables a party to obtain a default judgment against the defendant after service by publication is complete.<sup>186</sup>

Service by publication and service over a social networking site are similar because both methods involve notifying the defendant of a lawsuit in a public forum. Service by publication involves publishing a summons and complaint in a newspaper, where the general public is able to see the notice. There is a possibility the general public will see a notice served over a social networking site. However, the public aspect of social networking sites is limited to users of the site, and may be further limited by the defendant to users only within the defendant's network. These two methods share similarities in that both are last resort options beyond substitute service and service by mail. However, it is the differences between the two, which makes service over social networking sites a superior method to service by publication.

Service through a social networking site should be preferable to publication because of the restrictive qualities of service by publication.<sup>187</sup> In California, and as explained in *Greene*, a court will often only allow service by publication after the plaintiff has proven many diligent attempts to serve a

---

Website: *All About HTML: Starting with the Basics*, WEBDEVELOPER.COM, [http://www.webdeveloper.com/html/beginners\\_html.html](http://www.webdeveloper.com/html/beginners_html.html) (last visited Mar. 28, 2010).

<sup>184</sup> When posting a comment on a person's profile on either MySpace or Facebook, the user has the option to add a photo, allowing a digital format of a picture or digitally created or scanned document to be attached to the comment.

<sup>185</sup> See 28 U.S.C. § 1655 (West 2006) (allowing lien notices to be served by publication after personal service cannot be made on an individual); CAL. CIV. PROC. CODE § 415.50 (West 2004); see also *McKendrick v. Western Zinc Mining Co.*, 165 Cal. 24 (1913) (holding a "person" or corporation could be served by publication after diligent attempts to serve defendant personally and after service by certified mail had been attempted; in this specific case, attempts to serve a defendant personally and by mail were required by statute).

<sup>186</sup> *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315-16 (1950).

<sup>187</sup> See 28 U.S.C. § 1655 (West 2006) (allowing lien notices to be served by publication after personal service cannot be made on an individual); see also CAL. CIV. PROC. CODE § 415.50 (West 2004).

defendant personally, through an agent or resident at a defendant's home, and by mail.<sup>188</sup> Once a court allows a plaintiff to serve a defendant by publication, the plaintiff must publish the notice in an authorized newspaper or magazine in the county of the defendant's last known address.<sup>189</sup> Often, a plaintiff cannot find the defendant's last known address because he has moved out of the county.<sup>190</sup> Even if the defendant is still within the same county, there is no guarantee he will see the notice published in the newspaper.<sup>191</sup> In fact, the defendant is unlikely to see the notice.<sup>192</sup> In addition, with the Internet becoming a more popular mode of communication, newspaper and magazine media are becoming less and less popular.<sup>193</sup> Therefore, publication in newspapers and magazines will become increasingly unlikely to give actual notice to defendants.

Furthermore, when a plaintiff serves a defendant by publication, he or she must serve the defendant in the county of the defendant's last known address.<sup>194</sup> This restriction often prevents the plaintiff from serving the defendant at an address where the plaintiff knows the defendant is presently residing. If the plaintiff had an address he or she knew the defendant presently lived at, then service would be effected by personal or substitute service, or by mail. Often, the county where a plaintiff serves a notice by publication is a county where the plaintiff has attempted to look for a current address of the defendant, but failed to find one. When serving a defendant by publication, the plaintiff is essentially serving a person whose whereabouts are unknown or simply too difficult to trace. However, if a plaintiff serves a defendant over a social networking site, it would only be after the plaintiff has located defendant's profile on such a site. The presence of the profile itself is proof of the defendant's use of the site and his location, even if it is a virtual location on a website.

The interactive qualities of social networking sites, such as visitors' ability to post documents, photos and links to a user's profile, and visitors' ability to see the date and time of a user's activity on a site, make service over such sites more effective

---

<sup>188</sup> See CAL. CIV. PROC. CODE § 415.50 (West 2004) (state rules regarding service by publication); see also 456 U.S. 444, 452-54 (1982).

<sup>189</sup> For an example of California law regarding service by publication, see CAL. CIV. PROC. CODE § 415.50 (West 2004).

<sup>190</sup> *Mullane*, 339 U.S. at 315-16.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 315.

<sup>193</sup> *Who Killed the Newspaper?*, THE ECONOMIST, Aug. 24, 2006, available at [http://www.economist.com/opinion/displaystory.cfm?story\\_id=7830218](http://www.economist.com/opinion/displaystory.cfm?story_id=7830218).

<sup>194</sup> See CAL. CIV. PROC. CODE § 415.50 (West 2004).

than service by publication. These interactive qualities, as outlined in the next sub-section of this Note, prove not only that service over social networking sites is more effective than by publication, but also that it is more effective than service over email.

### *C. Service over E-Mail versus Service over a Social Networking Site*

Today's technology allows plaintiffs to serve defendants over the Internet through both email and social networking sites. The real question is whether the courts will or should allow service in this manner. The court in *Rio* allowed service by email, but "noted potential problems in confirming receipt of electronic message[s.] . . . verification requirements [and] . . . with attaching and viewing exhibits."<sup>195</sup> With social networking sites, there may be no way for a plaintiff to receive a confirmation receipt for any messages he sends a defendant or other users. However, depending on the particular site and a profile's privacy settings,<sup>196</sup> a plaintiff may be able to see when a person last logged onto his online account, or when he commented on another user's activity. Also, a process server may be able to post a copy of the summons and complaint or a link to such documents on the defendant's profile.<sup>197</sup> If the plaintiff is able to show the time of the defendant's last visit to his account, the plaintiff may be able to prove the likelihood that the defendant received actual notice.<sup>198</sup>

Social networking sites are similar to email because such sites allow users to send other users private messages, which are essentially emails, through a user's online account. However, because social networking sites' have more interactive qualities, the sites provide a more effective way to give notice to a defendant. These sites both allow plaintiffs to send private messages to a defendant user's inbox and to post public messages to a defendant user's profile page. Also, a defendant's social networking site profile may provide plaintiffs with information on how to locate the defendant or indicate the defendant's whereabouts.<sup>199</sup> This would perhaps shed light on why the defendant is so unreachable and therefore difficult or

---

<sup>195</sup> Chacker, *supra* note 15, at 619; *Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1018 (9th Cir. 1992).

<sup>196</sup> See *Help Center: Privacy*, FACEBOOK.COM, <http://www.Facebook.com/help.php?page=419> (last visited Apr. 6, 2009).

<sup>197</sup> See *supra* note 181; *supra* note 184.

<sup>198</sup> See Sanghvi, *supra* note 158.

<sup>199</sup> See *supra* note 181. A search for the author's own MySpace profile reveals not only age, but also her current location. At the user's discretion, this information can be hidden, however.

impossible to serve in person or by mail.

Many social networking sites have a posting feature, which is yet another way in which they differ from email. This feature allows other users to post a public message to a user's profile. The user's network can then view this message posted to his profile. If a message is posted in this manner, a defendant user will be very likely to see it. On Facebook and MySpace, users in a defendant user's network could view these public messages on the defendant's profile, unlike private messages which are sent to the profile's inbox much like e-mail. A defendant user receiving private messages can easily ignore the messages, or may simply fail to check his profile's inbox. When someone posts a public message to a defendant user's profile, however, not only will he see it, but it is likely many others in his network will see it as well. Often, a user receives an email when another user has posted a public message to his profile. Additionally, a plaintiff is more likely to effect notice of a lawsuit through public posting, because another user in defendant's network might see the post and then inform the defendant of the message.

If a plaintiff can serve a summons and complaint upon a defendant by posting the documents to the defendant's social networking site profile, it would be more effective than publication because notice would go directly to the defendant's own profile account. Nevertheless, this method may not be effective if the defendant has put up privacy blocks on the account, making it almost impossible to post or send him a message.<sup>200</sup> On the other hand, if there is enough information on the site to show a judge that the defendant is available online, there may be an opportunity to subpoena the site operator for records containing account information. Also, information showing a defendant has a profile on a social networking site may open the door to publication service over Internet sites.<sup>201</sup> If a plaintiff is aware the defendant is a member of a social networking site, but cannot reach the defendant through that site, it may be reasonable for the court to allow the plaintiff to publish the notice through an advertisement on the site itself.

Further, by looking at a defendant's activity on his or her profile page, a plaintiff may be able to see the date of the

---

<sup>200</sup> See *Help Center: Privacy*, FACEBOOK.COM, <http://www.Facebook.com/help.php?page=419> (last visited Apr. 6, 2009).

<sup>201</sup> "It would have been possible, no doubt, for the claimant to try and get information about the user from Twitter itself but this would have involved an application to a US court. That might, in any event, have led only part of the way, since Twitter would probably know only the email address and IP address of its user, requiring the claimant to make a further court application directed to the user's ISP." Dale, *supra* note 11.

defendant's last log-in or even the date and time of the defendant's commenting on another user's activity.<sup>202</sup> It is common for users of social networking sites to check their profile page for new postings and private messages when they log in. Also, for a defendant to comment on another user's activity, he or she must be logged into his profile account. If a defendant's profile shows frequent activity, then it is likely the defendant will receive notice sent to him or her through the social networking site.

Although it may be easy to see how frequently a defendant uses his or her social networking profile, without actually interacting with him or her, it is not as easy to determine how frequently a defendant uses his or her e-mail account. However, courts have allowed service by email despite the many issues that exist with this method.<sup>203</sup> The paramount issues involve confirming whether a defendant has received an emailed notice, and whether a return receipt alert email, if received, is sufficient to effect notice on the defendant.<sup>204</sup> Some courts have held email is not a sufficient form of notice, either because it is not explicitly allowed by Rule 4 of the FRCP, or perhaps because of the plaintiff's inability to confirm the defendant's receipt of the summons and complaint. However, other courts and scholars do give merit to service of process through email as an alternative method.<sup>205</sup> In many cases where courts have allowed service of

---

<sup>202</sup> If a defendant does something on Facebook, such as comment on a wall or post a status, a fellow user may be able to see details regarding the date and time of the activity depending on the defendant's privacy settings. See *Help Center: What can I do on the Wall?*, FACEBOOK.COM, <http://www.facebook.com/help/?page=820#!/help/?faq=13153> (last visited Jun. 29, 2009); Sanghvi, *supra* note 158 (describing the News Feed as a way to get information about other users' activity).

<sup>203</sup> *Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d at 1007, 1018 (9<sup>th</sup> Cir. 2002) (holding service of process by email proper despite potential problems, including confirmation of receipt, electronic signatures, and other technology incompatibility issues).

<sup>204</sup> *Id.*

<sup>205</sup> Compare *Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573, 579 (N.D. Cal. 1999) (holding service of a complaint and motion papers to defendant via email without the exhibits insufficient service under the Federal Rules of Civil Procedure) and *WAWA, Inc. v. Christensen*, No. Civ. A. 99-1454, 1999 WL 557936 at \*1 (E.D. Pa. July 27, 1999) (holding proper service of process was not achieved by plaintiff's attempt to serve a Danish defendant via email because such method was not explicitly allowed by Rule 4 of the Federal Rules of Civil Procedure), with *Rio Props. v. Rio Int'l Interlink*, 284 F.3d 1007, 1017-18 (9<sup>th</sup> Cir. 2002) (allowing plaintiff to serve the defendant, an Internet business entity, via email after plaintiff made diligent attempts to serve defendant by more traditional methods), and *Hollow v. Hollow*, 193 Misc.2d 691 (N.Y. Sup. Ct. 2002) (allowing plaintiff to serve her husband, a citizen of Saudi Arabia, with divorce papers via email, international registered air mail and international registered standard mail after plaintiff proved other attempts to serve her husband were futile) and *Ryan v. Brunswick Corp.*, No. 02-CV-0133E(F), 2002 WL 1628933 (W.D. N.Y. May 31, 2002) (holding serving a Taiwanese corporation via mail, fax or email was allowed under Rule 4(f)(3) of the

process via email, courts do not require plaintiffs to obtain an electronic notice confirming the defendant received and/or read their emailed notice.<sup>206</sup> Yet, many of the same cases allow service by email only after other methods of service have been attempted or have proven to be futile.<sup>207</sup> Therefore, in such cases, actual notice by email is less important to a court, due to the burden on the plaintiff to serve the defendant, and constructive notice is more acceptable. Due to the similarities between email and social networking sites discussed above, courts should also only allow plaintiffs to serve defendants over social networking sites after plaintiffs have attempted to serve them by other traditional methods, or such methods have proven to be futile. After plaintiffs have shown a court there is a great burden on them to serve the defendant, constructive notice via service over social networking sites should be acceptable, as it is with email and publication.

#### IV. FACTORS A COURT SHOULD CONSIDER WHEN ALLOWING SERVICE OVER A SOCIAL NETWORKING SITE

As stated earlier, before a federal court can consider whether a particular method of service is reasonable, and therefore constitutional under *Mullane*, the method must first be allowed by the FRCP or an applicable state statute.<sup>208</sup> Currently, Rule 4(e) of the FRCP allows a party to serve notice of an action on a defendant within a judicial district of the United States by (1) personally delivering the summons and complaint to the defendant, (2) leaving a copy of notice with a person of “suitable age and discretion” who resides at defendant’s residence, (3) delivering a copy of the notice to an authorized agent appointed by the defendant or by law to receive such notice, or (4) any method allowed under state law in which the district court sits or in which service is effected, so long as the method does not violate the defendant’s due process rights.<sup>209</sup> For example, if a plaintiff is serving a defendant in California, a

---

Federal Rules of Civil Procedure, and was not prohibited by the Hague Convention because Taiwan is not a member). See also Matthew R. Schreck, *Preventing “You’ve Got Mail” from Meaning “You’ve Been Served”: How Service of Process by E-Mail Does Not Meet Constitutional Procedural Due Process Requirements*, 38 J. MARSHALL L. REV. 1121, 1142-46 (2005) (arguing email does not satisfy due process requirements because it is difficult to know whether a defendant actually received the constitutionally required notice through this medium).

<sup>206</sup> *Rio Props.*, 284 F.3d at 1018; *Hollow*, 747 N.Y.S.2d at 708; *Ryan*, 2002 WL 1628933, at \*2.

<sup>207</sup> *Rio Props.*, 284 F.3d at 1013; *Hollow*, 747 N.Y.S.2d at 704; *Ryan*, 2002 WL 1628933, at \*2.

<sup>208</sup> See discussion *supra* Part II.D.

<sup>209</sup> FED. R. CIV. P. 4(e)(1)-(2).

California statute allows personal service, substitute service on a resident of the defendant's business or home, or service by mail or publication.<sup>210</sup> Therefore, a federal court sitting in California may consider the constitutionality of any such methods listed in Rule 4(e) of the FRCP and the California statute because the methods are explicitly allowed under both the Federal Rules and the California statute.

In *Rio Properties*, the court ruled on the constitutionality of e-mail as an alternative method of service, after it determined email abided by the rules of service upon individuals in foreign countries under FRCP Rule 4(f).<sup>211</sup> However, as discussed earlier in this Note, Rule 4(f) is broader than Rule 4(e).<sup>212</sup> Rule 4(f) allows plaintiffs to serve defendants by (1) any internationally agreed means of service reasonably calculated to give notice, (2) if there is no internationally agreed means of service, by a method reasonable calculated to give notice as prescribed by the foreign country's law for such service, as the foreign country directs in a letter in response to a letter of request, or, unless prohibited by the county's laws, personally delivering the summons and complaint on the defendant or by any form of mail requiring a signed receipt, or (3) by other means not prohibited by international agreement, as the court orders.<sup>213</sup> Essentially, Rule 4(f) allows plaintiffs to serve a defendant in a foreign country by any means of service reasonably calculated to give notice as long as the method is "not prohibited by international agreement."<sup>214</sup> Rule 4(e), however, is limited to the methods of services listed in Rule 4(e)(2) and is only broadened by Rule 4(e)(1), which allows service on defendants in the United States pursuant to applicable state law.<sup>215</sup> It is potentially problematic that state laws regarding service vary.

New York law allows for traditional methods of service as well as other alternative methods if service is impracticable.<sup>216</sup>

<sup>210</sup> See CAL. CIV. PROC. CODE §§ 415.10-95 (West 2004).

<sup>211</sup> FED. R. CIV. P. 4(f); *Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d at 1007, 1014-18 (9<sup>th</sup> Cir. 2002).

<sup>212</sup> See discussion *supra* Part II.D.

<sup>213</sup> FED. R. CIV. P. 4(f)(1)-(3).

<sup>214</sup> FED. R. CIV. P. 4(f)(1)-(3).

<sup>215</sup> FED. R. CIV. P. 4(e)(2) provides for service through (1) delivery to the individual personally, (2) leaving a copy at the individual's dwelling with someone of suitable age, and (3) delivering a copy to an authorized agent. Rule 4(e)(1) provides for service through the methods prescribed by state law. FED. R. CIV. P. 4(e)(1)-(2).

<sup>216</sup> See N.Y. C.P.L.R. 308(5) (McKinney 2001). See also discussion *supra* Part II.E.4. Other states have enacted similar statutes that allow courts to approve alternative methods of service "in any manner consistent with due process" when traditional methods are impracticable. See, e.g., 735 ILL. COMP. STAT. 5/2-203.1 (1993).

As seen in *Hollow*, a New York state court allowed a wife to serve her husband divorce papers through email and international mail.<sup>217</sup> This was after the wife's attempts to serve her husband with an international process server and through her husband's employer proved to be impracticable methods of service.<sup>218</sup> However, a California court may have ruled differently than a New York court. The only method of service California law allows outside of the traditional methods listed in Rule 4(e)(2), is service by publication, which merely gives defendants constructive notice of an action against them.<sup>219</sup>

In order for all federal courts to consider whether to allow service over a social networking site, Congress and state legislatures must adopt statutes similar to New York's service statute. Doing so would generally allow plaintiffs to serve defendants by any reasonable alternative method of service, if traditional methods are shown to be impracticable.<sup>220</sup> Rule 4(e) of the FRCP should be amended in a way that makes it as broad as Rule 4(f) of the FRCP, and more similar to New York's service statute. For example, Rule 4(e) should provide the following:

(e) Serving an Individual within a Judicial District of the United States. Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person with whom waiver has been filed—may be served in a judicial district of the United States by:

- (1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or
- (2) by doing any of the following:

---

<sup>217</sup> *Hollow v. Hollow*, 747 N.Y.S.2d 704 (N.Y. Sup. Ct. 2002).

<sup>218</sup> *Id.*

<sup>219</sup> FED. R. CIV. P. 4(e)(1)-(2); CAL. CIV. PROC. CODE § 415.50 (West 2004).

<sup>220</sup> Other countries already allow for new technology as an alternative method to serve process on a defendant. In the case of blogger Donal Blaney, the United Kingdom High Court allowed Mr. Blaney to serve an anonymous defendant via alternative service, which is allowed under the United Kingdom's relevant statute. *See Court Order Served Over Twitter: The High Court has Given Permission for an Injunction to be Served Via Social-Networking Site Twitter*, BBC NEWS (London), Oct. 1, 2009, available at <http://news.bbc.co.uk/2/hi/technology/8285954.stm>. The relevant language of Rule 6.15(1) of the Civil Procedure Rules states "[w]here it appears to the court that there is a good reason to authorize service by a method not otherwise permitted or by this Part, the court may make an order permitting service by an alternative method or at an alternative place." The statute also outlines how to make a request for alternative service, what evidence needs to be presented to the court, and examples of such applications. Examples include an application to serve a defendant by text message, with information about where the service documents are located. Civil Procedure Rules: Service of Documents, 2009, c. 6, § 6.15 (Eng.); CPR, 2009, c. 9, § 9.1 (Eng.).



- (A) delivering a copy of the summons and of the complaint to the individual personally;
- (B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there or
- (C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process, or;
- (3) by other means as the court, upon motion without notice, directs, if service is impracticable under Rule 4(e) (1) and (2).

California and states with similar service statutes should adopt a “catchall” provision similar to the one in New York<sup>221</sup> that allows for alternative methods of service, such as service over social networking sites, in state actions. Alternatively, federal and state statutes could explicitly permit service of process over social networking sites within their statutory text. Furthermore, any amended statutes, whether the explicit or the catch-all versions, should be applied similarly to domestic and foreign defendants, corporate entities, and individual persons.

Federal and state statutes should be amended to allow plaintiffs to serve defendants over social networking sites as an alternative method of service. This method should only be allowed, however, after a plaintiff demonstrates to the court diligent attempts to serve a defendant in person, by substitute service, or by mail. Most cases discussed in this Note, which allow alternate methods of service as a last resort, analyze whether a plaintiff attempted traditional methods of service and whether such methods were futile.<sup>222</sup> In *Rio Properties*, however, the Ninth Circuit held “that Rule 4(f)(3) is an equal means of effecting service of process under the Federal Rules of Civil Procedure and [it has committed] to the sound discretion of the district court the task of determining when the particularities and necessities of a given case require alternate service of process.”<sup>223</sup> According to that court, trial judges are permitted to engage in a benefit-burden balancing test to determine whether email service is appropriate on a case-by-case basis.<sup>224</sup> Some commentators have identified typical balancing factors used by courts in determining whether email

<sup>221</sup> N.Y. C.P.L.R. 308(5) (McKinney 2001).

<sup>222</sup> See discussion *supra* Part II.E.

<sup>223</sup> *Rio Props., Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1016 (9th Cir. 2002).

<sup>224</sup> *Id.* at 1018.

service is permitted including: “defendant’s elusiveness, familiarity or preference for electronic communication, and whether the defendant conducted business or communicated frequently by Internet or e-mail.”<sup>225</sup> Thus, while some jurisdictions view alternative methods of services as a last resort, others are willing to engage in a fact sensitive inquiry to determine whether alternative methods of service are appropriate in the particular case.

When courts consider whether a plaintiff should be allowed to serve a party over a social networking site, courts should apply a case-by-case balancing test, much like the balancing test the Ninth Circuit used in *Rio Properties*.<sup>226</sup> Courts should consider the defendant’s elusiveness, his familiarity or preference for electronic communication, whether the defendant conducted business or communicated frequently by Internet, e-mail or a social networking site, as well as whether the defendant’s profile can be located on a social networking site. This balancing test would allow a more flexible approach to determining viable alternative methods of service. It also would not require a plaintiff to exhaust all traditional methods of service before appealing to a court for permission to use alternative methods.

Service via social networking sites should be supplemented with another inexpensive and reliable method of service, such as postal mail, to increase the likelihood that a defendant will receive notice of a lawsuit.<sup>227</sup> However, courts should allow plaintiffs to serve defendants over social networking sites before requiring service by publication, due to the interactive qualities and inexpensive nature of social networking sites. Furthermore, publication is highly unlikely to effect actual service. It is normally used as a last resort to merely establish constructive service, thus enabling a plaintiff to obtain a default judgment against the defendant.<sup>228</sup> Although service over a social networking site is not as likely to be effective as personal service or postal mail with a return receipt, it is still more likely to be effective than publication.

In determining whether to allow a plaintiff to serve a

---

<sup>225</sup> Schultz, *supra* note 108, at 1514; see also Kevin W. Lewis, *E-Service: Ensuring the Integrity of International E-Mail Service of Process*, 13 ROGER WILLIAMS U. L. REV. 285, 296 (2008).

<sup>226</sup> See *Rio Props., Inc.*, 284 F.3d at 1016-19.

<sup>227</sup> See *Greene v. Lindsey*, 456 U.S. 444, 455-56 (1982) (recognizing posting alone is not enough and that mail service, as it is an inexpensive and efficient means for notifying a defendant, can “enhance the reliability of an otherwise unreliable notice mechanism”).

<sup>228</sup> See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315-16 (1950) (discussing at length the efficacy of publication as a means of serving notice).

defendant over a social networking site, courts must consider the authenticity of a person's online identity. This is an issue common to any form of Internet communication.<sup>229</sup> Specifically, courts should consider whether a plaintiff is serving the wrong defendant over a social networking site due to mistaken online identity or identity theft—where an “identity thief” poses as the defendant online.<sup>230</sup> In order to verify the authenticity of a defendant's identity, foreign and domestic courts have considered a variety of different factors. At least one commentator notes Australian courts have confirmed a defendant's online identity based on factors such as the date of birth listed on the defendant's site, and the fact co-defendants were listed as friends.<sup>231</sup> American courts could rely on similar factors to verify an online identity, including: whether members on the defendant's friends list are known family members, acquaintances, or co-defendants; the defendant's date of birth; and whether the defendant's listed hometown on his profile page matches one of the defendant's last known addresses.<sup>232</sup> Courts and state legislatures may also want to consider a defendant's last log-in or the date of his most recent activity, in determining whether or not service should be permitted via social networking sites. Once a plaintiff confirms the defendant's identity using the factors listed above, courts should generally allow the plaintiff to serve the defendant via the social networking site. One limitation on courts allowing this would be that the defendant's activity on the site should be within two

---

<sup>229</sup> See Jessica E. Vascellaro, *New Ways to Prove You Are Who You Say You Are Online: As Web-Safety Worries Grow, Range of Services Help Users Verify Each Other's Identities*, WALL ST. J., Aug. 3, 2006, at D1.

<sup>230</sup> See Jim Bruene, *Identity Theft Statistics from Javelin Research*, NETBANKER, Jan. 26, 2005, <http://www.netbanker.com/2005/01/identity-theft-statistics-javelin-research.html> (discussing statistics for financial fraud and identity theft in the United States); Helen Legatt, *Identity Theft Rises, Gen Y Most at Risk*, BIZREPORT, Mar. 5, 2009, available at [http://www.bizreport.com/2009/03/identity\\_theft\\_rises\\_gen\\_y\\_most\\_at\\_risk.html](http://www.bizreport.com/2009/03/identity_theft_rises_gen_y_most_at_risk.html) (noting that a person's identity can be stolen either offline or online, but online identity theft is on the rise). See also Zack Martin, *Social Networking Sites Have Little to No Identity Verification*, CR80NEWS, Mar. 31, 2008, <http://www.cr80news.com/2008/03/31/social-networking-sites-have-little-to-no-identity-verification/> (discussing social networking sites' lack of identity verification mechanisms to prevent creation of fake profiles); Colin McKay, *When Social Media Leads to Personality Theft*, CANUCKFLACK, Apr. 13, 2007, <http://canuckflack.com/2007/04/when-social-media-leads-to-personality-theft/> (discussing how user profiles on social networking sites can provide enough information for an identity thief to create a fake profile to “undermine” a victim's personality).

<sup>231</sup> See Malkin, *supra* note 27.

<sup>232</sup> Again, a search of an alleged defendant's profile on MySpace will show his or her age, current location and last login date. On Facebook, even if users outside of an alleged defendant's network cannot view his or her profile, a user may still have access to the defendant's friend list.

weeks prior to the motion for alternative service of process.

Requiring a preliminary identity verification and evidence of recent online activity would increase the likelihood online service of process would give notice to the proper defendant. Still, it may not ensure a defendant receives actual notice. However, in instances when a plaintiff attempts and fails to serve a defendant by traditional methods, and when the plaintiff can show listed alternative methods would be futile, the plaintiff is left with no choice, but to seek the court's permission to serve the defendant over a social networking site. In this situation, the court should apply *Rio Properties'* factors as well as the other factors discussed above, which would help ensure the defendant receives actual notice of service. Although the *Mullane* standard requiring a method of service be reasonably calculated to effect service is not a bright-line rule, and does not require a defendant receive actual notice of an action, courts nevertheless consider the likelihood that a method of service will give actual notice to a defendant who has a valuable interest at stake in the lawsuit.<sup>233</sup> Thus, a court should consider factors from *Rio Properties*, similar foreign decisions, and the qualities of current social networking sites when determining the likelihood of actual service on a defendant. This would allow the court to make a more informed decision as to whether to allow a plaintiff serve a defendant over a social networking site.

## V. CONCLUSION

A plaintiff should be allowed to serve a defendant over a social networking site in cases where the plaintiff has made a good faith attempt to serve process to the defendant in person, or through traditionally accepted alternative methods of service such as mail or substitute service. Service over a social networking site is an acceptable method of service when analyzed under the *Mullane* standard, which provides a method of service is valid if it is reasonably calculated to give a defendant notice of an action against him. Courts, Congress and state legislatures should seriously consider allowing plaintiffs to serve defendants over social networking sites. This serious consideration is due because in addition to the legal problems it might help solve, social networking sites have become an everyday mode of communication between friends, colleagues and even mere acquaintances.

---

<sup>233</sup> See discussion *supra* Part III.